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Supreme Court, U.S.
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No. 99-1060

IN THE

Supreme Court of the United States

LOCKHEED MISSILES AND SPACE COMPANY, INC.,

Petitioner,

v.

UNITED STATES OF AMERICA *ex rel.* MARGARET A. NEWSHAM and MARTIN OVERBEEK BLOEM,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENTS MARGARET A. NEWSHAM AND MARTIN OVERBEEK BLOEM

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QUESTIONS PRESENTED

1. Whether the Ninth Circuit violated retroactivity principles by applying the False Claims Acts' 1986 Amendments to a contractor's fraudulent conduct occurring after the effective date of those Amendments?

2. Whether the Ninth Circuit erred in noting that there did not appear to be any public disclosure of the information on which the action is based, although it did not have to determine that issue with finality?

3. Whether the Ninth Circuit erred in making the factual finding that Respondents were the original sources of the information on which the action is based?

4. Whether the Ninth Circuit violated the *Erie* doctrine by permitting the application of a California law providing special defenses to counterclaims under state law which deterred the exercise of constitutional rights, based on the findings that the state law's purpose was not coextensive with that of the federal procedural rules and there was no clear conflict between the state and federal rules?

PARTIES TO THE PROCEEDING

Respondents Margaret A. Newsham and Martin Overbeek Bloem were appellants in the court of appeals on the issues presented in the Petition (and appellees on a cross-appeal raising other issues not presented here), and *qui tam* relators in the district court.

Petitioner Lockheed Missiles and Space Company was appellee in the court of appeals on the issues presented here (and appellant on the cross-appeal).

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Respondents, Margaret A. Newsham and Martin Overbeek Bloem, respectfully request that this Court deny the Petition for a Writ of Certiorari filed on December 21, 1999, seeking review of the court of appeals' judgment in this case. The court of appeals' opinion is reported at 190 F.3d 963 (9th Cir. 1999) and reprinted in the Appendix ("App.") at 1a–21a. The court of appeals denied Petitioner's Petition for Rehearing and/or Rehearing En Banc on all of the issues presented here, with no Judge of that court requesting a vote on whether to hold an *en banc* rehearing. (App. 23a).

COUNTER-STATEMENT OF THE CASE

This case was nine and one-half years old at the time it was dismissed, on jurisdictional grounds, by the district court; and eleven and one-half years old by the time the court of appeals' decision reinstated the case. The underlying facts involve labor charging practices and invoices submitted to the United States by Petitioner Lockheed Missiles and Space Company ("LMSC") both before and after October 27, 1986, the effective date of the pertinent jurisdictional provision of the 1986 Amendments to the False Claims Act, 31 U.S.C. § 3730(e)(4)(A). The first issue presented in the Petition, one of "retroactivity", turns on this unique and temporally remote factual setting.

The court of appeals, in deciding the jurisdictional issues presented to it, differentiated between the two periods. It found that the district court lacked jurisdiction over claims based on invoices submitted before October 27, 1986, but had jurisdiction over claims based on invoices submitted after that date. The court of appeals' decision finding no jurisdiction over pre-1986 claims is not before this Court. The Petition seeks review of the ruling upholding jurisdiction over the post-1986 claims.

The "retroactivity" issue presented by the Petition arises in the unusual factual context of pre-1986 activities that were allegedly both: (i) known to the government and (ii) similar to the post-1986 conduct on which the court of appeals allowed the action to proceed. The Petition glosses over one critical fact, which it fails to mention in its discussion of "pre-1986 claims" and "post-1986 claims". The "claims" involved in this case are not just arbitrary categories based on division of the time period covered by Respondents' case into pre-Amendments and post-Amendments portions (*see* Pet. at 9 n.7). Instead, Respondents' action against Petitioner is based on LMSC's periodic submissions of numerous, individual invoices for payment — each of which constitutes a "claim" to the United States and each of which, Respondents allege, was false. (ER 752-A, para. 39).[1] Petitioner submitted some of those "claims" — those which are not pertinent to issues before this Court — prior to the effective date of the 1986 Amendments. It submitted others *after* that date, and in those invoices sought payment for work allegedly done by LMSC employees *after* the Amendments' effective date. Those post-1986 claims are the only ones involved in this case.

Several factual assertions in LMSC's Statement of the Case are misstated or erroneous. Respondent Newsham's 1984 disclosures to the DCAA alleged that LMSC employees who were supposed to be working on government contracts were in fact idle or not working on contract matters; however, the disclosures did not contain information about how the LMSC employees had been instructed to bill their time or had in fact billed their time. (ER 752-A, paras. 25-26). The DCAA's audit of these disclosures did not encompass any analysis or determinations pertaining to LMSC's billing practices, in particular the contention that LMSC had falsely

1. Although Petitioner dismisses the Respondents' First Amended Complaint as "irrelevant," (Pet. at 9 n.8), the court of appeals correctly ordered it to be filed. (App. 15a).

charged the government on contract accounts for idle or non-business activities of employees. (ER 746, Exs. 28-35; ER 752-A, paras. 26, 29, 32). Petitioner's factual assertions to the contrary (Pet. at 3, 4) are unfounded. Likewise, the Petition makes unsubstantiated assertions that the DCAA audited "all of Newsham's allegations," and that in concluding the government had "no claim against Lockheed" the DCAA had reviewed and found meritless the allegation of fraudulent charging (Pet. at 3, 4).[2]

REASONS FOR DENYING THE WRIT

The Petition raises no issues that warrant review in this Court.

(A) The factual setting in which Petitioner here urges the existence of a conflict is itself unique, non-recurring, and increasingly unimportant with the passage of time. This Court has recently articulated clear principles to guide decisions on retroactivity issues. In *Landgraf v. USI Film*

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2. Petitioner's only citation for these contentions is to an *amicus curiae* brief of the United States (SER 41) which does not constitute evidence and which itself cites no evidence for the propositions advanced. In fact, the DCAA audits found extremely high levels of non-productivity (*see* ER 752-A, paras. 27-28, 31), and invoked the remedy of forward-looking cost adjustments which was DCAA's customary sanction for overbilling. (*Id.* at para. 32).

LMSC refers to another incorrect fact, and incorrectly suggests that it has some basis, in citing to the district court's observation that " '[t]he parties agree that under the pre-1986 [FCA], the portions of the *qui tam* complaint based on plaintiff Newsham's allegations would have to be dismissed.' " (Pet. at 5). In fact, Respondents never made any such concession, and neither the district court's comment in passing nor the statement in the United States' *amicus curiae* brief (SER 41 at 8), which Petitioner also cites (Pet. at 5), has any value as evidence.

Products, 511 U.S. 244 (1994), the Court set out the pertinent general principles; and in *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939 (1997), the Court explained how those principles apply to the jurisdictional provision governing *qui tam* actions under the 1986 Amendments to the False Claims Act, 31 U.S.C. § 3730(e)(4)(A) (1986).

The court below correctly applied those principles in determining that the application of the 1986 Amendments provision to Petitioner's post-Amendments conduct was not a "retroactive" application of the Amendments. The decision below does not conflict with either this Court's retroactivity decisions, or any other appellate decisions that remain viable authority. The single earlier panel decision of the Ninth Circuit which forms the basis of Petitioner's claimed conflict argument has been vitiated by *Schumer* and is no longer followed by the Ninth Circuit itself.

(B) There is no reason to review the judgment below on the jurisdictional issues framed by Section 3730(e)(4)(A), as modified by the 1986 Amendments. The court below made factual findings in determining that there was no evidence of any public disclosure in this case, and in any event the court had jurisdiction because Respondents were original sources of the information on which the action is based. The other appellate decisions in which Petitioner purports to find conflicts with the decision below involve much different factual settings and, for the most part, were exactly the type of "parasitic" actions that the 1986 Amendments were designed to bar.

(C) There is no reason to review the Ninth Circuit's proper application of California's anti-SLAPP law in the adjudication of the state law counterclaims in this case. The question presented is a unique one that has never arisen before

and is likely to remain rare. No final judgment has been entered on the anti-SLAPP motion in this case. The anti-SLAPP law does not "directly collide" with the Federal Rules of Civil Procedure, and the state law embodies substantive policies protecting individuals from lawsuits designed to restrict their exercise of First Amendment rights. The court below correctly applied the *Erie* Doctrine and did not violate the teaching of *Hanna v. Plumer*, 380 U.S. 460 (1965), when it held that the state law applied in this case.

I.

THE COURT OF APPEALS' DECISION APPLYING THE 1986 AMENDMENTS' STANDARD TO FALSE CLAIMS SUBMITTED BY PETITIONER AFTER THE EFFECTIVE DATE OF THE AMENDMENTS RAISES NO QUESTION OF CONTINUING IMPORTANCE AND DOES NOT CONFLICT WITH OTHER APPELLATE DECISIONS.

The decision below found the 1986 FCA Amendments' jurisdictional provisions applicable to Respondents' claims based on invoices submitted by LMSC after October 27, 1986 for work allegedly performed by LMSC employees after that date. That decision raises no "retroactivity" issue worthy of this Court's review, and does not conflict with any decisions of this Court or any other federal appellate court.

(1) The keystone contention underlying Petitioner's position is that the "allegedly false claims submitted after 1986 [were] *merely a continuation* of alleged improper charging practices known to the Government prior to 1986" (Pet. at 12) (emphasis added). This factually unfounded contention is dependent on case-specific facts unlikely to be found in many, if any, other cases at this time, 14 years after enactment of the 1986 Amendments. *Every* invoice submitted

by LMSC which remains the subject of this action[3] was based on work allegedly performed after the effective date of the 1986 Amendments and was presented for payment after that date. Each such invoice constitutes a separate "claim" for False Claims Act purposes. *See* S. Rep. No. 345, 99th Cong. 2d Sess. 9 (1986), *reprinted in* 1986 U.S. Code Cong. & Admin. News 5266, 5269 *citing United States v. Bornstein*, 423 U.S. 303 (1976). Such invoices were not a "mere continuation" of prior claims, but were separate charges for work performed during the later time period.

Petitioner's argument is entirely dependent on its contention, which is contradicted by the facts summarized immediately above, that the practices challenged in this case began before October 27, 1986 and continued in similar form thereafter. At this point in time, the number of other cases involving such practices (even if they existed here) is small if not non-existent, and sure to diminish over time to none. Review of this issue by this Court would probably affect no case other than the case at bar.[4]

(2) The court of appeals' decision applying the 1986 Amendments' provisions to post-Amendments claims is a routine application of the principles established in *Landgraf v. USI Film Products*, 511 U.S. 244 (1994), and in no way conflicts with that decision. As required by *Landgraf*, the court of appeals decision gives effect to the time-honored

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3. In the portion of the opinion on which review is not sought here, the court of appeals barred Respondents' claims based on invoices submitted prior to October 27, 1986. (App. 12a).

4. Petitioner cites no other currently pending cases which present the same question in its unique factual setting, and Respondents' counsel are unaware of any such cases. It is scarcely conceivable that any could be brought in the future due to statute of limitations considerations.

"principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place," *Landgraf*, 511 U.S. at 265 (quoting *Kaiser Aluminum & Chemical Corp. v. Bonjorno*, 494 U.S. 827, 855 (1990) (Scalia, J., concurring).[5] In this case, where the law as enacted in the 1986 Amendments was applied to conduct that took place after those Amendments became effective, the presumption against "retroactive legislation" never comes into play because the 1986 Amendments provision is not being applied to pre-Amendments conduct but only to discrete post-Amendments conduct.

The decision below properly applies the holding of *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939, 117 S. Ct. 1871 (1997), and does not conflict with it. All of the conduct involved in *Schumer* occurred prior to the 1986 Amendments, 520 U.S. at __, 117 S. Ct. at 1875. Here, Petitioner submitted its false claims after the date of the Amendments. *Schumer* precludes application of the 1986 Amendments' jurisdictional provision only to pre-Amendments conduct, *id.*, 117 S. Ct. at 1878-1879.

If *Landgraf* and *Schumer* applied here in the way that Petitioner contends, the effect of that application would be to validate post-1986 Amendments fraudulent practices similar to conduct commenced before 1986 and known to the government. Such an interpretation would turn the retroactivity principles of *Landraf* and *Schumer* on their head, and thwart the intent of Congress in enacting the 1986 Amendments. That purpose was to prohibit certain fraudulent conduct prospectively — not to immunize it in perpetuity.

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5. Likewise, the court of appeals' decision gives effect to this Court's decision in *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939, 117 S. Ct. 1871 (1997), by holding that the court had no jurisdiction over pre-1986 Amendments claims. (App. 12a).

Landgraf and *Schumer* establish clear retroactivity principles applicable to the 1986 Amendments. There is no need to revisit their holdings in this context. To apply those holdings in the way urged by Petitioner would both confuse and undermine these clearly established principles.

(3) The Petition's attempt to fabricate a conflict at the circuit court of appeals level, on the question of *which* conduct is relevant for the retroactivity analysis — the government contractor's submission of false claims or the relator's disclosure thereof — is also unsubstantiated. Petitioner's assertion of a conflict rests entirely on a single panel opinion of the Ninth Circuit, *United States ex rel. Anderson v. Northern Telecom, Inc.*, 52 F.3d 810 (9th Cir. 1995), *cert. denied*, 516 U.S. 1043 (1996) ("*Anderson I*"). *Anderson I* is factually inapposite here[6] and has been superseded as a statement of the Ninth Circuit's view of the law on this point.[7] The Ninth Circuit itself has recognized

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6. *Anderson I* involved *only* claims submitted before the date of the 1986 Amendments, not, as here, claims that followed the Amendments and allegedly "continued" pre-Amendments practices. 52 F.3d at 812, 814. In addition, in *Anderson I*, as in all other cases on the point, the submission of the false claims preceded their disclosure. *Id.*

The illogical quality of Petitioner's contention in this case — that Respondent Newsham's disclosure of LMSC's post-1986 Amendments submissions preceded the submissions themselves — both reflects and explains the uniqueness of the factual setting of the question presented here.

7. *Anderson I* was decided prior to this Court's decision in *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939 (1997). As the Third Circuit pointed out in *United States ex rel. Cantekin v. University of Pittsburgh*, 192 F.3d 402, 411 (3rd Cir. 1999), the *Schumer* decision rejected the logical underpinning of

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that the binding effect of prior panel decisions is removed when, as here, a "Supreme Court decision . . . undermines those decisions." *Nghiem v. NEC Electronic, Inc.*, 25 F.3d 1437, 1441 (9th Cir.), *cert. denied*, 513 U.S. 1044 (1994). *Anderson I* therefore lacks continuing force as authority.[8]

The Ninth Circuit has twice demonstrated that it has abandoned the holding of *Anderson I* which Petitioner advances as the source of an inter-circuit conflict with *United States ex rel. Cantekin v. University of Pittsburgh*, 192 F.3d 402 (3rd Cir. 1999).[9] There is thus no current conflict on this

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Anderson I's holding — the erroneous belief that "the 1986 amendment did not change the legal consequences of [the contractor's] conduct." The court in *Cantekin* observed that the *Schumer* decision's "reasoning would be in deep tension, if not outright conflict, with using the date of disclosure instead of the date of submission for determining retroactivity," and found that this Court's analysis [in *Schumer*] "strongly supports using the . . . date the allegedly false claim was submitted" in determining whether the Amendments were being retroactively applied. 192 F.3d at 409-410.

8. Nor does Petitioner's citation to the Ninth Circuit panel's unpublished opinion in the *Anderson II* decision, *United States ex rel. Anderson v. Northern Telecom, Inc.*, 141 F.3d 1179 (TABLE), No. 96-36152, 1998 WL 141179 (9th Cir. March 27, 1998), add anything to its argument. Under Ninth Circuit Rule 36-3, such an unpublished decision is non-precedential and may not be cited in the Ninth Circuit. Moreover, even though *Anderson I*'s holding may have been reiterated, it still lacks viability post-*Schumer*.

9. The first such decision was *United States ex rel. Lujan v. Hughes Aircraft Co.*, 162 F.3d 1027, 1031 (9th Cir. 1998), in which the court held that it is the government contractor's conduct, not the relator's, to which retroactivity analysis applies. The second is the opinion below, reiterating that same holding. (App. 11a-12a).

retroactivity point between the law of the Ninth Circuit, as confirmed in the opinion below, and the law of the Third Circuit or any other court of appeals.[10]

II.

THE OPINION BELOW IS NOT IN CONFLICT WITH OTHER CIRCUIT COURT DECISIONS APPLYING THE TWO ELEMENTS OF THE 1986 AMENDMENTS' JURISDICTIONAL PROVISION.

The second and third questions presented involve determinations required by the two prongs of the 1986 Amendments' jurisdictional test for *qui tam* actions, 31 U.S.C. § 3730(e)(4)(A): whether the action was based on information "publicly disclosed" prior to its filing, and if so whether the relator was "an original source" of the information. Both of these issues are highly fact-dependent, as Petitioner concedes (Pet. at 18), and in this posture do not present broadly applicable questions of law.

(1) The question presented in the Petition regarding the "public disclosure" test was not squarely decided by the court below. The Ninth Circuit merely observed that there was "no evidence suggesting" pre-lawsuit public disclosure here, and that the court need not decide the public disclosure question because Respondents met the "original source" test. (App. 14a) This Court is properly reluctant to grant *certiorari* in order to review questions not finally decided below. *See Brotherhood of Locomotive Firemen v. Bangor & Aroostock R. Co.*, 389 U.S. 327, 328 (1967) (per curiam).

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10. To the extent the Petition's argument is based on an alleged split of authority *within* the Ninth Circuit, that problem is both illusory here for reasons explained in the text and not ordinarily a proper basis for invoking this Court's power of review. *See Davis v. United States*, 417 U.S. 333, 340 (1974).

The decisions cited by Petitioner as in conflict with the decision below on the "public disclosure" question involve different facts and different issues. In *United States ex rel. Doe v. John Doe Corp.*, 960 F.2d 318 (2nd Cir. 1992), 21 federal agents executing a search warrant took over the government contractor's premises during business hours and discussed the alleged fraud with numerous "innocent" employees who happened to be present, many of whom knew nothing about the fraud allegations. 960 F.2d at 319-320, 322-23. The Second Circuit held this constituted a "public disclosure" barring a *qui tam* action brought by an attorney for one of the contractor's employees based on the same allegations of fraud. *Id.* at 323. The other cases advanced by Petitioner — *United States ex rel Stinson, Lyons, Gerlin & Bustamente, P.A. v. Prudential Ins. Co.*, 944 F.2d 1149 (3rd Cir. 1991), and *United States ex rel. Kreindler & Kreindler v. United Technologies Corp.*, 985 F.2d 1148 (2nd Cir.), *cert. denied*, 508 U.S. 973 (1993) — were, like *Doe*, *qui tam* actions brought by lawyers who learned about the alleged frauds only through their representation of clients in litigation which produced discovery material containing information about the fraud. Those decisions present paradigm examples of the sort of parasitic claims that the "public disclosure" and "original source" requirements were specifically designed to preclude.

The decision below does not conflict with Petitioner's attorney-relator trilogy of authorities. The degree of public disclosure involved in civil litigation (the *Stinson* and *Kreindler* cases) or in discussions with all employees present in a workplace (the *Doe* case) far exceeds that involved in private communication of a non-public audit report to officials of the audited company — especially where the company selects its representatives, as LMSC did.

(2) The Petition's effort to find a conflict between the decision below and decisions of other appellate courts on the question presented regarding the "original source" test is also

strained. As the Third Circuit succinctly observed in *United States ex rel. Stinson, Lyons, Gerlin & Bustamante*, *supra*, 944 F.2d at 1161, "[t]he paradigmatic 'original source' is a whistleblowing insider" who is a "close observer[] or otherwise involved in the fraudulent activity," *citing* legislative history, S. Rep. No. 345, *supra*, at 4. *See also United States ex rel. Plumbers & Steamfitters Local Union No. 38 v. C.W. Roen Construction Co.*, 183 F.3d 1088, 1092 (9th Cir. 1999) (similar language describing the "archetypal" relator). Respondents fit this description exactly.

As both courts below found, the DCAA audit report resulted from Respondents' disclosure of their "direct and independent" knowledge of the fraud in Respondent Newsham's 1984 complaint to the DCAA. (App. 29a, App. 8a-9a) Respondent's knowledge of the relevant facts did not originate in the governmental documents. These facts distinguish this case from both of the decisions cited by Petitioner as embodying a conflict, *United States ex rel. Hafter v. Spectrum Emergency Care, Inc.*, 190 F.3d 1156 (10th Cir. 1999), and *United States ex rel. Mistick PBT v. Pittsburgh Housing Authority*, 186 F.3d 376 (3rd Cir. 1999), *pet. for cert. filed*, No. 99-969 (December 8, 1999).[11] There is no inconsistency between the factual findings of both courts below that Respondents were original sources in this case (App. 30a, App. 14a), and the findings that the relators in *Hafter* and *Mistick* were not "original sources."[12]

11. In *Hafter*, the relator failed to show any personal basis for the knowledge of fraud. 190 F.3d at 1163. In *Mistick*, the relator's knowledge was not personal but derived from documents obtained from the Department of Housing and Urban Development through a FOIA request, which as the court noted is a public source. 186 F.3d at 388-89.

12. Petitioner's attempt to secure review of the determination by two courts below that Respondents were original sources runs counter to this Court's traditional reluctance to review findings of fact made by the district court and concurred in by the court of (Cont'd)

Petitioners' authorities acknowledge that "it is not necessary for a relator to have *all* the relevant information in order to qualify as 'independent'." *Stinson*, 944 F.2d at 1160; *see also Mistick*, 186 F.3d at 389; *Hafter*, 190 F.3d at 1163 (emphasis supplied); and *Wang v. FMC Corp.*, 975 F.2d 1412, 1418-19 (9th Cir. 1992) (to be an original source, relator must have "played a part" in the disclosures), citing *United States ex rel. Dick v. Long Island Lighting Co.*, 912 F.2d 13, 16-17 (2nd Cir. 1990) (relator must be "directly or indirectly" responsible for disclosure). Since Respondents clearly possessed some of the information, and caused the government auditors to uncover additional information, there is no conflict between the decision below finding Respondents "original sources" and the other decisions cited in the Petition.[13]

III.

THE APPLICATION OF CALIFORNIA'S ANTI-SLAPP LAW TO THIS CASE AS ORDERED BY THE NINTH CIRCUIT DOES NOT CONFLICT WITH DECISIONS OF THIS COURT OR OTHER COURTS OF APPEALS.

(1) The fourth question presented by the Petition, relating to the application by the court below of California's anti-SLAPP[14] law, Cal. Code Civ. Proc. § 425.16, has apparently never before been addressed in any case

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appeals. *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 665 (1987), *quoting Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 336 U.S. 271, 275 (1949).

13. Insofar as the Petition relies on allegedly conflicting panel opinions within the Ninth Circuit (Pet. at 23 n.23), this ground does not support granting the Petition. *See* footnote 10 at p. 10, *supra*.

14. "SLAPP" stands for strategic lawsuit against public participation. "Public participation" connotes the exercise of First Amendment freedoms. (App. 15a-16a).

(*see* App. 17a). This is not surprising, since that issue could only arise where a federal court's supplemental jurisdiction is invoked for a state law SLAPP claim brought against a party exercising his First Amendment rights.

Petitioner cites no other states' laws, nor any other California law, whose applicability in federal court cases might be affected by this Court's review of the decision below. To address such a question before it has been entertained in more than one lower court, and in the absence of any square conflict or indication of exceptional importance, would be an unusual exercise of this Court's discretionary certiorari power.

Moreover, the decision below did not finally resolve Respondents' anti-SLAPP claim. As the Ninth Circuit noted (App. 20a), the district court did not rule on Respondents' motion to strike or motion for fees. The district court merely held the anti-SLAPP law inapplicable (App. 27a), and the court below reversed. The court of appeals' holding will not be ripe for review until the district court enters, and the court below reviews, a final order on the Respondents' anti-SLAPP motions. *See Brotherhood of Locomotive Firemen v. Bangor & Aroostock R. Co.*, *supra*, 389 U.S. 327.

(2) The decision of the court below on the anti-SLAPP issue is in harmony, and not in conflict, with prior decisions of this Court and other appellate courts on related questions. In asserting the purported conflict, Petitioner relies primarily on this Court's decision in *Hanna v. Plumer*, 380 U.S. 460 (1965). *Hanna* was only this Court's first discussion of the particular standard for deciding whether a rule of state law is impermissibly inconsistent with a federal rule of procedure, and therefore warrants an exception from the rule of *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938). This Court explained and limited the *Hanna* exception to *Erie* in two following

cases — *Walker v. Armco Steel Corp.*, 446 U.S. 740 (1980), and *Burlington Northern R. Co. v. Woods*, 480 U.S. 1 (1987) — whose directly applicable holdings Petitioner does not mention.

Under *Walker* and *Burlington Northern*, the vague standard invoked in the Petition - whether the "situation" at issue is "covered by" the relevant federal rule — is a first step in the analysis, not the ultimate test as Petitioner urges. (Pet. at 26). Those authorities require, for the *Hanna* exception to come into play, that the purposes of the federal and state rules must be not merely similar or related, as the Petition suggests, but "co-extensive"; and that the state law must be in "direct collision" with the federal rule, and the resulting conflict must be "unavoidable." *Walker*, 446 U.S. at 749-50; *Burlington Northern*, 480 U.S. at 4-5. The decision below follows those standards.

(3) Comparison of the Federal Rules of Civil Procedure and the California anti-SLAPP law produces nothing approaching the type of conflict that must be found under *Walker* and *Burlington Northern* to justify failure to apply the anti-SLAPP law consistent with *Erie* doctrine and the goal of "sensitivity to important state interests and regulatory policies," *Gasperini v. Center for Humanities*, 518 U.S. 415, 426 n.7 (1996). As the court below properly found, *see* App. 15a-16a, the anti-SLAPP law addresses only a very limited class of cases for which the California Legislature expressed a very specific set of concerns. The procedural provisions of the anti-SLAPP law address a special motion which is not co-extensive with a motion to dismiss or a motion for summary judgment under Rules 12(b)(6) or 56 of the Federal Rules of Civil Procedure. Rather, the anti-SLAPP law provides a supplemental means of adjudicating questions relevant only to a limited class of California causes of action.

Nothing in the anti-SLAPP law prohibits, or is in direct conflict with, the filing or determination of Rule 12(b)(6) or 56 motions under the Federal Rules.[15] The anti-SLAPP law merely provides an alternative or supplemental procedure for protecting the rights of a particular set of parties (persons exercising the constitutional rights of speech and petition) from a particular type of abusive action (a SLAPP suit). To hold the anti-SLAPP law unavailable in federal court proceedings on state law causes of action, as the Petition urges, would encourage forum-shopping as between federal and state courts in violation of one of the major aims of *Erie*. *See Hanna*, 380 U.S. at 468.[16]

IV.

THE COURT SHOULD DECLINE TO HOLD THIS PETITION PENDING DECISION IN *STEVENS* ON THE CONSTITUTIONALITY OF THE FCA'S QUI TAM PROVISIONS.

The Court should decline to follow Petitioner's suggestion that, if the Petition is not granted, it should be held pending a decision in *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, O.T. 1999,

15. Nor does the decision below require or contemplate substitution of the anti-SLAPP procedures or standards for adjudicating a motion for summary judgment or a motion to dismiss in such an action. Since the court below did not require use of state procedures on a federal Rules-based motion, there is no conflict between its decision and the three Court of Appeals decisions cited by Petitioner in the last paragraph of section III of the Petition (Pet. at 28).

16. Contrary to the Petition's assertion (Pet. at 26 n.26), the opportunity for forum shopping is the same here, where the District Court has federal question jurisdiction of the FCA claim and supplemental jurisdiction of the state law claims, as in a diversity case.

No. 98-1828. That procedure would inflict needless delay on a case that has already been pending for over a decade at the pre-trial stage.

The constitutionality issue taken up by the Court in the *Stevens* case is jurisdictional in nature. If the Court were to deny *certiorari* here and subsequently hold the *qui tam* provisions of the False Claims Act unconstitutional in *Stevens*, Petitioner could renew its motion to dismiss in the courts below without further delay. *See Mutuelles Unies v. Kroll & Linstrom*, 957 F.2d 707, 711 (9th Cir. 1992) (party may challenge existence of jurisdiction at any time). The Court should not, therefore, further delay the process of re-starting an already-old case.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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